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No. 581

In the Supreme Court of the United States

OCTOBER TERM, 1969

CHARLES HOFFMAN, JR.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Charles Hoffman, Jr., prays that a writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on July 18, 1969.

OPINION BELOW

The Opinion of the Court of Appeals is as yet unreported, but is reprinted herein as Appendix A, *infra.*

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on July 18, 1969. A timely petition for rehearing was denied on August 13, 1969 (Appendix C. *infra*). This Petition is filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where an indictment charges a general scheme to defraud policy holders of an insurance company and then particularizes that charge by alleging a specific scheme to defraud in respect to one transaction involving the sale of control of the insurance company, and defense motions to discover other particulars of the claimed general scheme are denied, may the prosecution, under the guise of proving intent, motive and design, introduce at trial a large mass of evidence of unrelated acts and transactions by the defendant and others, occurring both before and after the alleged specific fraudulent transaction, and showing questionable business practices in the conduct of the affairs of the insurance company, friction with the state regulatory agency and alleged misappropriations of funds so that the total dollar amount of the alleged fraud is increased over four times that charged in the indictment?

A. Must the trial judge, in deciding whether to admit evidence of acts and transactions not charged in the indictment for the purpose of showing intent, motive and design, weigh the potential prejudice of such evidence against its possible relevance?

B. Where such evidence is admitted to prove intent, motive and design, and its volume exceeds that of the

evidence introduced to prove the indictment transaction, should the trial judge specifically identify such evidence in instructing the jury as to the purpose for which it was received?

C. Where evidence of non-indictment offenses involving misappropriations from the insurance company is introduced during the course of an extended trial only against a co-defendant, who is subsequently acquitted by direction of the court, should the trial judge specifically identify such items of evidence in instructing the jury to disregard it?

2. If it is determined that news material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, should the trial judge examine the jurors individually and outside the presence of each other as to their exposure to that material, or may he collectively ask for a show of hands as to who has seen or read the material?

3. Do the due process, double jeopardy and cruel and unusual punishment clauses of the Constitution prohibit the imposition of consecutive sentences for multiple offenses arising out of the same act or transaction, because of the opportunity or possibility of arbitrary administration by either the prosecution or judiciary, and, in this respect, should *Blockburger* v. *United States,* 284 U.S. 299 (1932) and *Gore* v. *United States,* 357 U.S. 386 (1958), be overruled?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall be * * * subject for the same offense to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty or property without due process of law; * * *"

The Eighth Amendment, Constitution of United States, provides in pertinent part:

> "* * * Nor [shall] cruel and unusual punishments [be] inflicted."

STATEMENT

Petitioner was jointly indicted with Rufus R. McLarty by the United States Grand Jury. The four-count indictment charged both defendants with substantive violations of the mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343) and a conspiracy to violate those statutes (18 U.S.C. § 371). Petitioner alone was charged with the further offense of transporting funds obtained by the alleged fraud in interstate commerce (18 U.S.C. § 2314). (A. 2-9)[1]

At the close of all the evidence, McLarty's motion for a judgment of acquittal was granted as to all counts. Petitioner's motion was granted as to Count Three and his case submitted to the jury on the remaining counts. A verdict of guilty was returned thereon, and Petitioner was sentenced to a period of ten years confinement in the custody of the Attorney General, followed by a term of five years probation (see, *infra*, p. 20).

The nub of the charges was Petitioner's conduct in selling to McLarty two corporations (RCD Man-

[1] "A....." references are to the Appendix of Record filed in the Court of Appeals.

agement, Inc. and RCD Agency, Inc.) concerned with the management of the affairs of Multi-State Inter-Insurance Exchange, and in receiving, as proceeds of the sale, $333,000 which were allegedly obtained from Multi-State by fraud. Count One charged that Petitioner devised a scheme to defraud "the policy holders and claimants against policy holders of Multi-State by means of false and fraudulent pretenses, representations and promises, * * *" (Count I, par. 5; A. 3) The indictment described the scheme as involving a false pretense that Multi-State owed RCD Agency and RCD Management $400,000 (Count 1, Par. 6; A. 3) in order to enable McLarty to use $333,000 of this amount in consummating the purchase of the Agency and Management from Petitioner. (Count I, pars. 7, 8, 9; A. 3-4) No other facet of the alleged scheme was described by the indictment.[2]

Pre-trial Motions

Prior to trial, Petitioner moved for a bill of particulars, requesting to be advised what the Government would contend were the false pretenses and the false and fraudulent representations by which he schemed to defraud Multi-State's policy holders and claimants, as claimed in the general allegations of paragraph five of Count One. (R. 24-5)[3] The Government resisted this motion (R. 129-30),

[2] Count Two incorporated by reference all of the "descriptive" paragraphs of Count One. (A. 5) The conspiracy count (Three) reiterated, almost verbatim, the "descriptive" passages of the substantive counts. (Count III, pars. 6, 7, 8, 9, 10, 11; A. 7-9) The one overt act charged that Petitioner deposited the proceeds of the sale in a Chicago bank. (A. 9) The transportation count (Four) alleged that Petitioner transported these proceeds from Georgia (where the sale was consummated) to Chicago knowing them to have been obtained by fraud. (A. 9)

[3] "R....." references are to the record as filed in the Court of Appeals.

and it was denied. (R. 10) Again prior to trial, Petitioner sought to examine documents bearing on transactions involving Multi-State which occurred after the sale to McLarty, because, as he expressed to the district judge, of a concern "that during the course of this trial the Government may introduce proof of events which took place after February 4, 1964, the date alleged in the indictment on which the transactions—" described in the indictment occurred. (A. 1017) This request for discovery was also denied. (A. 1019)

Evidence in Support of Indictment Allegations

In support of its claim that Petitioner received funds from Multi-State as consideration for the sale of RCD Management and Agency to McLarty, the Government introduced evidence showing that in the summer of 1963 the Illinois Insurance Department began a routine examination of Multi-State for the period October 1, 1960, to December 31, 1962. The examination disclosed that Multi-State's books did not reflect a liability to RCD Management for approximately $200,000 in fees owed under a power of attorney agreement,[4] and that, if the fee were recorded, Multi-State's surplus would be impaired to the extent that it would be required to cease selling insur-

[4] Under Illinois law, all the business of a reciprocal insurance company is conducted by an attorney-in-fact. (Ill.Rev.Stat., 1967, Ch. 73 §§ 673, 697) RCD Management acted as attorney-in-fact for Multi-State under a written power of attorney (G.Ex. 4, A. 1037-40) approved by the Illinois Director of Insurance in 1961. That power provided that RCD Management was to receive twelve per cent of the gross annual premium deposit income of Multi-State as a management fee. Prior to February 4, 1964, RCD Management assigned all monies owing from Multi-State under the power of attorney to RCD Agency. (G.Ex. 29, A. 1055-56)

ance. In July, 1963, Drobny, the counsel for the Department, told Petitioner, who was the chief executive officer of Multi-State, that unless RCD Management executed a written waiver of the fee for the period under examination Multi-State would not receive a favorable examination report. Thereafter, Petitioner delivered such a waiver (G. Ex. 5) to Drobny. (A. 124-34, 165-6). No waiver was requested or given for 1963.

Multi-State's problems with the Department continued. In November, 1963, the Director of Insurance brought an action in the Circuit Court of Cook County to liquidate Multi-State pursuant to statute. The action was prompted by a number of alleged violations of the Illinois Insurance Code by Multi-State, but no claim was made that the reciprocal was insolvent. (A. 878; G. Ex. 7; D. Ex. 3) Indeed, Multi-State's June 30, 1963, financial statement, filed with the Department in August, 1963, showed assets of $2,461,725 and a surplus of $250,000. (G. Ex. 2; A. 1032-3) On December 18, 1963, the parties agreed to an order dismissing the action. As a result, the Circuit Court found that Multi-State had voluntarily ceased writing new insurance, and had commenced cancelling existing policies. In addition, Multi-State was required to notify the Director of Insurance and to file a statement of condition and submit to an examination thereon before resuming business. (G. Ex. 9; D. Ex. 3; A. 1045-6, 1083)

During January, 1964, Petitioner and an associate, Albert Druker, negotiated for the sale of RCD Management and RCD Agency (which were wholly owned by Petitioner) to McLarty. (A. 499-500) Petitioner explained that after the entry of the December, 1963, order by the Circuit Court of Cook County he decided to sell RCD Management and Agency. Petitioner's attorney told him that it would be

to his tax advantage to sell Management and Agency and thus receive a long term capital gain, rather than to cause payment of the fee to Agency and then make distribution to himself as a dividend. He had also been advised by his attorney that the waiver of attorney-in-fact fees for 1961 and 1962 was not binding because it had been executed and delivered upon the unfulfilled condition that Multi-State would thereafter receive a favorable examination report from the Department for the years in question. (A. 782-4) This testimony was corroborated by the attorney. (A. 866-9)

As a consequence, Petitioner, McLarty and Druker met several times in Georgia to discuss the proposed sale. (A. 500) Petitioner advised McLarty that, after all offsets, Multi-State owed the RCD companies over $400,000 and that Multi-State had sufficient funds to pay the debt. (A. 229, 493, 784-6, 796) He showed McLarty and McLarty's attorney, Byrd, a paper containing computations to that effect. (A. 229) Petitioner and McLarty executed a contract for the sale of all of the stock of RCD Management and Agency for $333,333. The order entered by the Circuit Court of Cook County on December 18, 1963, was attached to the contract. Petitioner also delivered other documents, including an assignment of a contract between himself and RCD Management by which Management agreed to pay him the fee which it was to receive from Multi-State under the attorney in-fact agreement. Petitioner also delivered an affidavit that he had not waived any rights under the assigned contract. (G. Ex. 45-46; A. 1065-73) The closing was held on February 4, 1964, in Reynolds, Georgia, in order to accommodate Byrd, who was recuperating from a heart attack. (A. 256-7)

McLarty secured the $333,000 with which to make the payment to Petitioner in the following manner: Prior to February 4, 1964, Petitioner, at McLarty's request, had transferred approximately $585,000 of Multi-State's funds from various Chicago banks to a bank in Kingsland, Georgia. These funds were returned to Chicago by the bank on January 31, 1964. (A. 211-20, 1062-4) When Petitioner received these funds he went to the First National Bank of Chicago and conferred with an employee about getting the money to Reynolds, Georgia, again at McLarty's request. The Chicago bank then credited the account of Multi-State at the Reynolds bank through its corresponding bank in Raleigh, North Carolina. (A. 325-39) On February 4th, McLarty opened accounts at the Reynolds bank for Multi-State, RCD Agency and himself. He drew a $335,000 check to Agency from the Multi-State account and deposited it in the Agency account; he then paid himself $334,000 from Agency and deposited it in his personal account; finally, he drew a $333,000 check on his account and with it paid Petitioner. Petitioner endorsed the check for deposit to his account at the Lake Shore National Bank in Chicago and arranged for the funds to be transferred by wire from the Reynolds bank to his own. (A. 274-7, 295-306)

Irrelevant and Prejudicial Evidence

Over Petitioner's objections at every juncture—during opening statement, while the evidence was being introduced, after it was admitted, during closing arguments and in post-trial motions—the trial court permitted the government to introduce evidence of a plethora of transactions involving not only Petitioner's conduct of the affairs of Multi-State and RCD Agency and Management in matters

not related to the indictment offense, but involving the conduct of the affairs of these business entities after the February 4th sale as well. This proof also included activities of the co-defendant McLarty resulting in the misappropriation of $279,000 for his own benefit. In the end, although the indictment charged a misappropriation of $333,000, Petitioner was accused of taking four times that amount and the jury heard him described as having engaged in a "wholesale looting" of Multi-State in the amount of a "million and a half dollars." (A. 979)

Evidence of Friction with Department of Insurance

A former attorney for the Illinois Department of Insurance, Fred Levin, was permitted to testify to a conversation with Petitioner in November, 1961, in which Levin recommended that Multi-State adopt a more liberal attitude regarding the settlement and disposition of claims. Levin said that Petitioner replied, "if the State continued to push him on these things, he would write an excessive amount of premium and leave the State with an empty shell of a company." (A. 691-6, 702-3, 710) The Court of Appeals, in response to Petitioner's claim that this evidence was prejudicially irrelevant and immaterial, mistakenly believed that this conversation occurred during a meeting concerning "the financial impairment" of Multi-State, and held that it expressed Petitioner's "intent and motive." (App. A., *infra*, p. 10) Repeated references based on this same erroneous premise were made to this evidence in the prosecutor's closing arguments. (A. 951, 953, 995-6)

Ostensibly to show that Petitioner knew of Multi-State's insolvency on February 4th, the Government has said (G. Br., pp. 59-60),[5] it was necessary to introduce evidence that

[5] "G.Br. ....." references are to the Brief filed by the Government in the Court of Appeals.

in September, 1963, Drobny had challenged certain bonds of the Griffin Finance Company held by Multi-State as an admissible asset, and contended that Multi-State's surplus was impaired thereby. In addition, however, the Government was also permitted to prove other circumstances strongly suggesting that the bonds were spurious and that Griffin Finance did not exist. (A. 136-40) Furthermore, the Government was also allowed to show that in February or March, 1964, Druker received a $35,000 check drawn to the order of Griffin Finance Company from RCD Management as a finder's fee for his work in assisting McLarty to purchase the two RCD companies. (A. 491) Petitioner had not been told about that payment to Druker. (A. 499)

In another vein, the Government was allowed to show, through the testimony of a former employee, that Petitioner directed efforts by Multi-State to avoid paying claims against its policy holders, and had left instructions to advise the Insurance Department, should it inquire about a particular claim, that the company was taking "pains to take care of that claim." (A. 538-9)

Evidence of other alleged misappropriations

The Government was permitted to prove that in September, 1963, Multi-State paid a total of $83,000 to RCD Agency and Progressive General Agency[6] for certain improvements which they had paid $43,000 in July to have made to a building owned by Petitioner. At the same time Multi-State entered into a twenty-year lease with Petitioner. (A. 464-7, 523-4, 641-2) At the end of November, 1963, Multi-State assigned its leasehold interest to Progressive General Insurance Company.[7] In consideration

[6] An Illinois Corporation owned by Petitioner.

[7] An Illinois stock insurance company controlled and owned by Petitioner's Insurors Holding Corp.

of Progressive General's acceptance of the lease and, perforce, the primary obligation for the long term rent, Multi-State abandoned the improvements to Progressive General. It did, however, continue to occupy a portion of the building as a sub-tenant of Progressive General. (A. 525-8, 642-3) From that time until January 24, 1964, Multi-State made additional payments of $32,604 for leasehold improvements to its space in the building. (A. 641, 644-5) After the February 4th sale, McLarty moved Multi-State, RCD Agency and RCD Management from the building. (A. 524-5) A chart introduced by the Government accused Petitioner of diverting $116,154 from Multi-State in this transaction. (G. Ex. 75; A. 742, 1082) The prosecutor referred to this evidence and similar evidence at length in his closing argument to support his theme that Petitioner was a "crook" and a "manipulator"[8] who "looted" Multi-State of more than a million dollars, thus driving Multi-State into insolvency to the detriment of its policy holders, who were potentially subject to assessment to make up for Multi-State's deficits or to claims upon their estates to satisfy judgments which Multi-State could not defend, and to the detriment of persons injured by these policyholders who could not look to an insurance company to compensate them fully for their injuries. (See, e.g., A. 954-7, 992, 996)

The Government was allowed to show that RCD Management transferred title to a law library and two cars to another corporation owned by Petitioner in exchange for services performed by that corporation. (A. 543-4) Subsequent to the transfer, Multi-State made three payments totalling $666.71 on existing chattel mort-

[8] The Court of Appeals agreed with Petitioner that government counsel appealed to sympathy and prejudice by referring to Petitioner in such and more opprobrious terms, but found the error "harmless." (App. A, *infra*, p. 15)

gages on the cars. (A. 660-2) There was no evidence to show that Petitioner was aware of these payments. Again, the Government's chart (G.Ex. 75, A. 1082) accused Petitioner of diverting the value of the law library and the payments from Multi-State. And the prosecutor made several references to this evidence as showing other misappropriations of Multi-State's funds. (A. 953-4, 963, 982)

Moreover, the Government was also allowed to show individual payments of money to Petitioner which were unconnected with the charged scheme. These payments—a $6,000 salary payment from Multi-State on December 31, 1963, and a $20,000 salary payment from RCD Agency (after Agency had received an advance on commissions from Multi-State) on January 2, 1964,—were included in the chart (G.Ex. 75, A. 1082) and formed a basis for the prosecutor's closing argument on how Petitioner had engaged in "massive looting" of Multi-State. (A. 957-9, 982)

Continuing along the same lines, the Government was permitted to show that another $139,750 was obtained from Multi-State in the following manner. On December 30 and 31, 1963, RCD Agency loaned $89,500 to Progressive General Agency from the Multi-State premium trust account. (A. 645-9) At the same time an entry was made on RCD Agency's books showing commissions of approximately $87,000 due Progressive General by reason of a 4% fee contract executed between the parties and dated January 2, 1963. This amount was offset against the $89,500 leaving RCD Agency owed a balance of $2,500. (A. 649-54) In September, 1963, RCD had loaned Petitioner $50,000 ($40,000 of which had come from the sale of the leasehold improvements—see pp. 11-12, *supra*) in exchange for his note secured by a junior mortgage. On February 13, 1964,—following the sale to McLarty—RCD Agency as-

signed the mortgage to Progressive General Agency in consideration of the cancellation of the 4% contract and as a credit against amounts due under that contract, although nothing was owing on that date because Multi-State did not write any insurance during the month of January, 1964. (A. 655-9; G. Ex. 36, A. 1057-8) The Government's chart included these transactions under a separate section showing an alleged transfer to Progressive General of $139,750 of Multi-State property. (G.Ex. 75, A. 1082.) Again, the prosecutor relied on these transactions as evincing the manner in which Petitioner "dipped into Multi-State's monies." (A. 958-9, 964)

The Government also introduced evidence which it claimed (A. 965-6, 982) showed that Multi-State had sustained a $200,000 loss in a complicated securities transaction which occurred substantially after February 4, 1964. The evidence, which ostensibly was introduced to show design and Petitioner's intent on February 4th, centered about Multi-State's July 1964, sale of 326.225 shares of preferred stock in Insurors Holding Corp. (a "closely held" holding corporation) to Petitioner's So-Jess Management, Inc., for $500 a share, or $163,000. Multi-State had started to acquire this stock in August, 1962, at an eventual total cost of $362,625. (A. 473-86) On February 4th, Multi-State acquired its last block of this stock by exchanging shares of Progressive General Insurance Company. (A. 479) To establish the alleged loss, the government showed that in May of 1964, Progressive General Agency purchased identical stock from individuals at the cost of $1200 a share and that on July 15, 1964, Progressive General Agency paid $1,000 a share for the stock. (A. 488-9) No effort was made, however, to value the securities or to gauge the fairness of the transac-

tion in question. The stock had no determinable value. (A. 484-7) The transactions were the subject of a separate Government chart (G. Ex. 73, A. 1080), which concluded that Multi-State had lost $200,000 in the sale of its securities. The prosecutor referred to this transaction as evincing Petitioner's desire to obtain more of Multi-State's assets. (A. 965, 966, 982)

Misappropriations by McLarty

A substantial amount of proof concerning misappropriations by McLarty after February 4, 1964, was admitted throughout the long trial over the objections of both defendants that these acts had no bearing on the defendants' motives or intents on February 4th and that the central object of the scheme and conspiracy was accomplished, if at all, on February 4th. (A. 278-94) The proof, showing several disbursements by McLarty for his own personal benefit of funds over a seven-month period totalling approximately $279,000, was graphically illustrated on Government's Exhibit 74 (A. 1081) and was explained in detail by the government's summation witness, Postal Inspector Head. (A. 733-9; see also A. 295-303, 307-15, 316-21) Although the evidence was admitted only as to McLarty (A. 295, 309, 317), it was depicted on the chart in conjunction with Petitioner's receipt of the $333,333 allegedly obtained by the scheme to defraud. After McLarty was acquitted at the conclusion of all of the proof, Petitioner unsuccessfully moved for a mistrial because of the prejudice created by the evidence. (A. 11, 16-17, 928-9) Petitioner then moved that the jury be instructed to disregard all evidence relating to events which occurred after February 5th, or which was introduced solely as to McLarty, and to disregard the prosecutor's opening statement with respect to those matters. (A. 17-22) He also moved that the jury be advised as to the

names of the witnesses whose testimony should be ignored. (A. 931-3) These motions were denied. (A. 23, 929-34) The trial judge gave a general instruction that the jury should disregard evidence "admitted solely against the defendant Rufus McLarty" and the prosecutor's opening statement regarding that evidence.

Petitioners alleged mismanagement of Multi-State

In early 1963, prior to the aforedescribed examination of Multi-State (see p. 6, *supra*), Petitioner asked George Bloss, the nominal president of RCD Management, to sign Multi-State's 1962 annual statement. (G. Ex. 2). Bloss said he thought the "claim reserve" figures were incorrect. Petitioner insisted the figures were correct and said "that's the way it was going to be submitted." Bloss claimed he asked Petitioner, "Does this mean that I will go to jail?" and he replied, "Don't you worry about it. I will take care of everything." (A. 556-8) Although it later claimed that this testimony was introduced to show that Petitioner actually conducted the affairs of RCD Management and Multi-State (G. Br., p. 61), the Government used this testimony at trial to bolster a general attack on the truthfulness of all Multi-State reports prepared under Petitioner's direction. (A. 972-3)

Despite an initial awareness that evidence RCD Agency did not have the requisite Illinois license to sell insurance from and after March 1, 1963, did "not tend to prove the charge in the indictment" (A. 157-8; R. 347-68), the trial judge eventually permitted introduction of such evidence. (A. 548)

Finally, the Government was allowed to show that on September 11, 1964, Multi-State was placed into liquidation by the Circuit Court of Cook County and that, at the

time, there were approximately 3,000 unpaid claims against Multi-State policy holders and Multi-State then had about $3,000 in its bank accounts. (A. 119-22, 154-7, G. Ex. 11, A. 1046) The prosecutor referred extensively to Multi-State's liquidation and the resulting effect of that liquidation upon policy holders and claimants against policy holders in his summation. (A. 991-2).

In response to Petitioner's claims that the trial court improperly admitted the foregoing evidence because it was irrelevant and immaterial, and also because its net prejudicial effect far outweighed any possible relevance, the Court of Appeals, per Judge Kerner[9] held:

> In November, 1963, the Illinois Director of Insurance attempted to enjoin Multi-State from transacting any further business. Simultaneously, Hoffman set in motion the series of transactions that finally depleted the assets of Multi-State, as well as the intricate direction of multitudinous inter-organizational assumptions of financial obligations and asset transfers all of which were "so blended or connected with the one on trial as that proof of one incidentally involves the other." *Bracey* v. *United States, supra.* Hoffman continued to execute his threat to leave an "empty shell" through his actions and directions after the "sale" in February, 1964, by obtaining the signatures of the "purchasers" on documents authorizing transfers after the sale date.

[9] Judge Kerner, the Governor of Illinois during the times in question, had appointed the Illinois Director of Insurance. The trial court recognized that the Director had initiated a campaign to deal with "these insurance things" in Illinois. (A. 1012)

We hold that the trial court properly allowed the introduction of other transactions to prove motive and design to establish a common scheme relating to the matter on trial.

(App. A, *infra*, pp. 10-11)

Prejudicial News Publicity

The trial court consistently directed the jury, at the close of almost every day, not to read any newspaper stories concerning the case. (E.g., A. 118, 665, 854) Petitioner testified in his own behalf on Thursday, May 4, 1967. (A. 754-848) On Friday, May 5, 1967, the Chicago Tribune published a story concerning Petitioner's testimony, but added that "The government contends Hoffman fraudulently converted $817,000 to his own use." The story also stated that Multi-State had been "taken over in September, 1964, by the state department of insurance for insolvency and non-payment of claims." Under a separate sub-heading, "Policy Holders Lose," the article added the following, which was not in record: "The insurance company's 20,000 policy holders lost their premiums and were left without any insurance when the state took over Multi-State." (A. 1020)

On the next trial day, Petitioner moved that each juror be examined, outside the presence of the other jurors, "with respect to whether he or she has read the stories * * *, and such other questions as may arise from that inquiry." (A. 1019-20) The trial judge denied the motion and instead inquired from the jury collectively whether any of them had read anything about the case over the week-end. No juror responded. (A. 12, 854-7)

On the day following the trial judge's direction of acquittal as to McLarty, all four major Chicago newspapers published stories about the case. (A. 1021-24) One story

asserted that Multi-State "failed in 1964, owing its policy holders some $800,000." (A. 1021) A second reported that "The government contends that Hoffman looted the insurance company between 1960 and 1963 while Multi-State was being managed by RCD Management Company, then owned by Hoffman." It also repeated its earlier statement that, "in 1964, the state department of insurance took over Multi-State because it was insolvent and unable to pay claims. The firm's 20,000 policy holders lost their premiums and were left without insurance." (A. 1022) The third paper reported that final arguments were about to be made "in an insurance fraud case the government contends ruined an Illinois insurance company and left 20,000 policy holders without auto coverage." That story also reported that "McLarty and Hoffman were accused of diverting $585,000 belonging to the Multi-State Insurance Company * * * * " and that the trial judge had said "the prosecution failed to make a case against McLarty." (A. 1023) The fourth story reiterated that the defendants were charged with defrauding the insurance company of $585,000 and stated that the company was "taken over by the state in 1964 for insolvency and non-payment of claims. The company's 20,000 policy holders lost their premiums and were left without insurance when the state took control." (A. 1024) Petitioner again moved for the individual, in camera, questioning of each juror. (A. 1021-4) This motion was denied and the jury was again asked as a whole whether any of them had read anything about the case. No juror responded. (A. 934-6, 948)

At the conclusion of the case, the jury was charged to dismiss any newspaper articles from their minds and to base their verdict solely on the evidence.

The Court of Appeals held that, if no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, the trial judge is not required to conduct an examination of the jurors individually and outside of the presence of the other jurors. (App. A, *infra,* p. 12)

Sentencing

Following denial of his post-trial motions, Petitioner was sentenced on Count Four to ten years imprisonment and to pay a fine of $10,000 and costs. The trial judge placed Petitioner on probation for five years on Counts One and Two, the probation to commence upon Petitioner's release from the incarceration imposed on Count Four and to be conditioned upon Petitioner's making restitution in an amount to be ascertained by the Illinois Director of Insurance. (A. 28-29, 110-15)

The Court of Appeals held, upon the authority of *Blockburger* v. *United States,* 284 U.S. 299 (1932), that Petitioner was not entitled to complain of the consecutive sentencing "since the violations for which the defendant was found guilty are two separate offenses under 18 U.S.C. §2314 and §§1343 and 1341." (App. A, *infra,* p. 16) However, the Court did hold that "Failure of the condition of probation to meet the requirements of identity and amount requires that the cause be remanded for revision of the condition of probation to meet the requirements of 18 U.S.C. §3651, or the vacation of such condition." (App. A, *infra,* p. 19)

REASONS FOR GRANTING THE WRIT

1. The admission of a large volume of evidence unrelated to the specific offense charged in the indictment.

No one, it may be assumed, would seriously contend that a defendant in a criminal case may be tried on charges that are not made in the indictment against him. *Ex parte Bain*, 121 U.S. 1 (1887); *Stirone* v. *United States*, 361 U.S. 212 (1960). Yet, in a very practical sense, that is exactly what happened in the instant case. Granted, the means by which this was accomplished were substantially different from *Bain* and *Stirone*, where the trial courts permitted either amendment of the indictment or so charged the jury as to effect an amendment, but the result is so startlingly similar as "to call for an exercise of this Court's power of supervision."

The trial of this case commenced upon the justifiable assumption that what was involved was Petitioner's sale of RCD Management and Agency in consideration of $333,000 which was paid to him after being obtained from Multi-State upon the claim that Multi-State was indebted to RCD Agency in that amount. (Indictment, Count I, pars. 6-10; A. 3-5) So framed, the issues were whether Petitioner devised a scheme to defraud by falsely pretending that Multi-State owed $335,000 to RCD Agency, when in fact no debt existed, or whether the debt did exist, or, if not, whether Petitioner honestly believed it did.

It cannot be said that Petitioner was lax in making this assumption. His pre-trial motions — directed toward discovering whether the Government intended to broaden the

alleged scheme to defraud by the introduction of evidence of "other offenses"—were all denied. (A. 10, 1015; Tr. 23-38)

Nevertheless, by the device of purporting to show other offenses, the Government was permitted to broaden the alleged scheme to the extent that Petitioner found himself defending not only his conduct in the sale of RCD Management and Agency, but his conduct in the management of these companies and Multi-State and the conduct of others after he sold the two companies as well. (See, e.g., A. 978, 982, 988) The device employed by the Government is not uncommon in so-called "financial crime" prosecutions. Cf. *United States* v. *Hoffa,* 7th Cir. 1966, 367 F.2d 698, 730-732 (dissent); *Nees* v. *Culbertson,* 5th Cir. 1969, 406 F.2d 621; *United States* v. *Accardo,* 7th Cir. 1962, 298 F.2d 133. Yet the standards for testing the admissibility of such evidence are far from uniform. Compare, *McHale* v. *United States,* D.C.Cir. 1968, 398 F.2d 757, with *United States* v. *Cobb,* 7th Cir. 1968, 397 F.2d 416 (the former denying and the latter affirming that subsequent similar transactions may be introduced to show intent); compare *United States* v. *Accardo,* 7th Cir. 1962, 298 F.2d 133 (evidence of prior tax returns showing receipts of large amounts of money apparently from gambling not admissible to prove motive, intent or willfulness in prosecution for making false and fraudulent statements in income tax return), with *United States* v. *Houlihan,* 2nd Cir. 1964, 332 F.2d 8 (evidence regarding the financial problems of two companies involved in the indictment transactions and of manipulations of the assets of these companies by the defendants admissible to show "motive"). See generally, Orfield, Relevancy in Federal Criminal Evidence, 43 Neb.L.R. 485, 517-31, 537-42 (1964).

The decision of the Court of Appeals does little to promote uniformity in this area. By sanctioning the admission of the extraneous evidence of Petitioner's other alleged misappropriations, of his friction and conflicts with the Illinois Department of Insurance, of other aspects of his management of the affairs of Multi-State and the two RCD companies, and of the post-February 4th conduct of the affairs of these entities upon the premise that these various and varied transactions and events were "so blended or connected with the one on trial as that proof of one incidentally involves the other" (App. A, *infra*, p. 11), the decision not only broadens the scope of the prosecution but introduces two additional factors which call for the intervention of this Court's supervisory powers.

First, the effect of the decision fairly well eliminates any possibility of weighing the prejudice engendered by extraneous evidence against its possible relevance. See, e.g., *Frank* v. *United States*, D.C.Cir. 1958, 262 F.2d 695; *DeVore* v. *United States*, 9th Cir. 1966, 368 F.2d 396; *United States* v. *Phillips*, 7th Cir. 1967, 375 F.2d 75, 81 (dissenting opinion). The recently promulgated "Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates" contains the following recommendation (Proposed Rule 4-03(a)):

> "(a) Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

The present case exemplifies a number of instances in which this principle would have valid application. For example, to show, purportedly, the degree of control which Petitioner exercised over the conduct of the affairs of

Multi-State, the Government introduced evidence of an incident wherein Petitioner commanded Bloss to sign Multi-State's annual statement. But the evidence also included an assertion that Petitioner had misstated the reserve for claims and that the misstatement was criminal in nature. (A. 556-8) In addition, the Government was allowed to bring out further evidence that there had been an alteration of the figures in this statement, evidence which was stricken only after it failed to prove that Petitioner had actually made those changes. (A. 554-5)

Second, the use of potentially misleading and prejudicial extraneous evidence for special purposes, such as to prove motive and design, should be accompanied by some specific explanation of the manner in which each item of evidence is to be considered so that the jury is not confused or misled. Cf. *Ahrens* v. *United States*, 5th Cir. 1959, 265 F.2d 514, 516 ("A cautious use of such testimony as to other crimes has been made quite generally over the years. The court below observed the requisite caution when it charged the jury *specifically* that the King testimony was not admitted as proof of the substantive crime charged against appellant, but only to assist the jury in arriving at his motive and intent in doing the things he did." Emphasis added.) The Court has touched on the subject in *Schaffer* v. *United States*, 362 U.S. 511 (1960), where subsequently discovered misjoinder of defendants was held not to be prejudicial because of the manner in which the trial court had " * * * meticulously set out separately the evidence as to each of the petitioners and admonished the jury that they were 'not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant.' " 362 U.S. at 515. Here, Petitioner had asked that the same care be exercised with respect both as to the evidence allegedly offered to prove motive and intent

and as to that offered solely against the co-defendant McLarty (A. 17-23, 29, 31-33), but only general, non-specific instructions were given.

2. Prejudicial publicity appearing in all four major Chicago newspapers during the course of the trial required that the trial judge examine each juror individually as to possible exposure to such publicity.

The publicity concerning this case which appeared in all four major Chicago newspapers during the trial is notable for two reasons. First, most of the newspaper items reported that Petitioner was being tried for or had been accused of misappropriating sums grossly in excess of those charged in the indictment. These articles thus dovetailed with the prosecution's ultimate theory of the case in which Petitioner found himself accused of the "wholesale looting" of Multi-State and of misappropriating one and one-half million dollars, even though the indictment alleged a specific misappropriation of $333,000. In one of the articles, Petitioner was directly accused of having joined with McLarty in misappropriating $585,000 and, by innuendo, in view of the reported findings of the trial judge that the prosecution "failed to make a case against McLarty," accused of having misappropriated this sum by himself. Petitioner, as we have noted, advised the trial judge of his fear that he would suffer prejudice by reason of evidence showing McLarty's misappropriation of $210,000 of this $585,000 which had been transferred to Georgia, and requested the judge to exclude this evidence specifically from the jury's consideration. The trial judge refused this request, preferring instead to instruct the jury generally. But any juror who read the prejudicial news account would clearly have been led to the erroneous conclusion which Petitioner feared.

Second, all of the newspaper items reported highly inflammatory accounts of Multi-State's fate — noting that 20,000 policy holders had been deprived of value for their premium payments and left without insurance by this fate. Although there was no evidence introduced concerning the effect of Multi-State's "failure", nor could any have been introduced, these articles also dovetailed with the prosecutor's closing argument, in which he said:

> "Could he have believed that these families that he left without any money, could he have believed that he could write them worthless insurance and cheat them and defraud them? Could he believe that that money was owing? Of course not; of course not. * * *
>
> " * * * They asked you on the voir dire whether you had been involved in accidents, because they didn't want one of those people here. But it could have been you, it could have been your next door neighbor, and he would have the money in his pocket and they would be destitute, mortgaging homes, garnishing wages because there is no money because he put it in his pocket, because he has cheated these people, and he tells you 'Good faith', multiple corporations, maneuvering back and forth all the time, nominees, hiding behind everything, and he tells you 'Good faith'. * * * " (A. 991-2)

In the face of prejudicial news reporting that lent potential substance to such prosecutorial tactics, Petitioner asked that the trial judge examine each juror, individually, whether he or she had been exposed to such publicity.

Adhering to *Margoles* v. *United States*, 7th Cir. 1969, 407 F.2d 727, 735, in which it had said that where prejudicial publicity is brought to the court's attention during trial, the trial judge must ascertain if any jurors had read or heard the publicity, and, if so, such jurors must then be examined individually and outside the presence of each

other to determine the effect of the publicity, the Court of Appeals here refused to adopt the practice announced by the Tenth Circuit of making the initial inquiry of each juror out of the presence of the others. *Mares* v. *United States,* 10th Cir. 1967, 383 F.2d 805; see also, *Hall* v. *United States,* 10th Cir. 1968, 396 F.2d 428, 429.

In *Mares,* defense counsel called a prejudicial news article appearing during trial to the attention of the trial judge and moved for a mistrial. He did not ask the court to poll the jury. The Tenth Circuit held:

> "The nature of the article was such that the trial court should have immediately ascertained whether any jurors had been exposed to it. * * * It should have been done by a careful examination of each juror out of the presence of the remaining jurors." 383 F.2d at 809.

In two decisions preceding *Margoles* the Seventh Circuit had intimated that individual examination of jurors was the approved practice. In *United States* v. *Accardo,* 7th Cir. 1962, 298 F.2d 133, Judge Kiley, who rendered the decision of the court, stated that the trial judge "should have, by the careful examination of each juror, out of the presence of the other, determined the effect of the articles on those who have read them and whether they discussed the articles with others." 298 F.2d at 136.

Similarly, in *United States* v. *Largo,* 7th Cir. 1965, 346 F.2d 253, 256, the court, in commenting on *Accardo,* stated that "the better practice is to interview each juror singly out of the presence of all of the other jurors." Cf. *Silverthorne* v. *United States,* 9th Cir. 1968, 400 F.2d 627, 644 ("We think that in view of the nature of some of the newspaper publicity unfavorable to the appellant, the trial court should have interrogated the jury, in camera, when requested to do so by defense counsel.").

Because one judge dissented in *Accardo*, and Judge Duffy wrote a separate concurring opinion, the Seventh Circuit subsequently explained, in *Margoles*, that it would not follow Judge Kiley's opinion. See *United States* v. *Palermo*, 7th Cir. 1969, 410 F.2d 468, 471 n. 3.

The American Bar Association Advisory Committee on Fair Trial and Free Press (the "Reardon Committee Report") has followed *Mares* and the suggestions expressed in *Accardo*, *Largo* and *Silverthorne*, and recommended:

> "If it is determined that material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. * * * " Project on Minimum Standards for Criminal Justice, American Bar Association, Standards Relating to Fair Trial and Free Press, Approved Draft (1968) §3.5(f).

The Commentary specifically notes that "It is important, however, that the method of separate questioning * * * be followed here and that the court not adopt a practice such as that employed in *Smith* v. *United States* [8th Cir. 1956, 236 F.2d 260], where the trial judge asked anyone who 'violated the instructions of the court' to raise his hand." Project on Minimum Standards for Criminal Justice, American Bar Association, Standards Relating to Fair Trial and Free Press, Tentative Draft (1966) Commentary to §3.5(f), p. 145. And, even though the Seventh Circuit has rendered *Accardo* substantially impotent on this question, the Committee recommendations expressly approve (pp. 145-6) Judge Kiley's observation in *Accardo* that jurors collectively examined in public would be hesi-

tant to reveal that they had violated a district judge's admonition not to read about the case, but that the same reluctance would be diminished by individual in camera examinations. *United States* v. *Accardo,* 7th Cir. 1962, 298 F.2d 133, 136.

What Petitioner herein requests is that this Court, in the exercise of its supervisory powers, examine the conflict between recent rulings of the Seventh Circuit on the one hand, and rulings of the Tenth and Ninth Circuits, and former expressions of the Seventh Circuit on the other hand. The need for such an examination and ultimate expression by this Court, we respectfully suggest, is advanced by the recommendation of the American Bar Association.

3. Imposition of consecutive sentences deprived Petitioner of due process of law and denied him his constitutional protection against double jeopardy and cruel and unusual punishment.

Despite this Court's reaffirmation of the principles announced in *Blockburger* v. *United States,* 284 U.S. 299 (1932) as recently as 1958 in *Gore* v. *United States,* 357 U.S. 386, the issue of whether a trial judge may sentence consecutively for violations of more than one statute arising out of the same transaction continues to provoke dissatisfied reaction. The reasoning of *Blockburger* and *Gore* has been rejected by a number of states. See, e.g., *Maynes* v. *People,* ..... Colo. ....., 454 P.2d 797 (1969) reversing consecutives sentences imposed for burglary and larceny arising out of the same transaction on the ground that such sentencing practices are "inherently wrong and unjust"; *People* v. *Duszkewycz,* 27 Ill.2d 257, 189 N.E.2d 299 (1963) (two punishments cannot be imposed for a single act, even

though different ingredients are involved in the two crimes.) Compare, Ill.Rev.Stat., 1967, Ch. 38, § 1-7(m), which prohibits cumulative punishment where the offenses arise out of the same conduct. One commentator has pointed out that the rationale employed by the majority in *Gore* — that the intent of Congress to permit imposition of cumulative sentences is expressed by the existence of the varying statutes — is questionable in the least. Comment, Twice in Jeopardy, 75 Yale L.J. 262, 302-4 (1965).

It is the opportunity for, or possibility of, arbitrary administration by either the judiciary or the prosecution which exposes the *Blockburger-Gore* principle to constitutional criticism. Cf. *United States* v. *Ewell,* 383 U.S. 116, 125 (concurring opinion of Mr. Justice Brennen), 126 (dissenting opinion of Mr. Justice Fortas, with whom Mr. Justice Douglas joined) (1966); *Hoag* v. *New Jersey,* 356 U.S. 464, 477 (dissenting opinion of Mr. Justice Douglas, with whom Mr. Justice Black joined) (1958); *Ciucci* v. *Illinois,* 356 U.S. 571, 573 (dissenting opinion of Mr. Justice Douglas, with whom the Chief Justice and Mr. Justice Brennan joined) (1958); *Bartkus* v. *Illinois,* 359 U.S. 121, 150 (dissenting opinion of Mr. Justice Black, with whom the Chief Justice and Mr. Justice Douglas joined) 164 (dissenting opinion of Mr. Justice Brennan, with whom the Chief Justice and Mr. Justice Douglas joined) (1959). Contrariwise, the statutory scheme which Mr. Justice Frankfurter proposed as the basis for the decision in *Gore* is not open to the constitutional criticism, because it is precise and offers no opportunity for arbitrary administration.

It is on this basis that we respectfully urge the Court to reconsider *Blockburger* and *Gore.* Consecutive punishments for multiple offenses arising out of the same act or

transaction may be permitted where specifically provided for by statute. But that hypothetical situation, used as the rationale for *Gore,* is not the situation which actually exists. What exists is an almost unbridled opportunity for arbitrary administration by the courts and the prosecution, and it is as a limit on that type of administration which the constitutional safeguards have traditionally been regarded.

CONCLUSION

For all of the reasons advanced herein the Petition for Certiorari should be granted.

Respectfully submitted,

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